LARCENY AND THE PERKINS CASE.

It is not the object of this paper to present an extended discussion of the doctrine, established for the State of New York by the final decision in *People ex rel. Perkins* v. *Moss*.[1] Its chief purpose is to summarize the facts of the case, to recite briefly the history of its progress through the courts, and to comment upon the conflicting views contained in the Court of Appeals opinions.

The facts are neither complicated nor numerous. During the fall of 1904, Mr. McCall, the president of the New York Life Insurance Company, promised Mr. Bliss, the treasurer of the Republican National Committee, that the company would contribute up to the sum of $50,000 for use in the Presidential campaign then in progress. The relator, Mr. Perkins, advanced from his own resources to Mr. Bliss $48,500; these advances were made at the request of Mr. McCall, who promised relator that he should be reimbursed later. The reason for relator's advancing the money, instead of having the contribution made directly from the funds of the company, was stated at the time by Mr. McCall to be, that it would make it easier for him to refuse demands which were being made for other political contributions. In December, 1904, the relator was reimbursed, pursuant to the directions of President McCall, after the matter had been discussed in a meeting of the Finance Committee, of which Mr. Perkins was chairman, and Mr. McCall a member. No formal vote was taken in the committee about the matter, nor was any entry made of the transaction in the minutes of the committee. The reimbursing check was made payable to J. P. Morgan & Co., of which banking house Mr. Perkins was a member; neither the face of the check nor any of the entries upon the Insurance Company's books indicated that the check was given to redeem Mr. McCall's promise to contribute up to $50,000 to the Republican National Committee.

Upon depositions by officers of the company stating the foregoing facts, and a letter from the relator to District Attorney Jerome, declaring that the relator believed the foregoing expenditure to be for the benefit of the company, and that he derived no personal advantage of any kind from the transaction, and had no

[1] (1907) 187 N. Y. 410, 80 N. E. 383.

intent other than to serve the interests of the company, Magistrate Moss issued a warrant of arrest for Mr. Perkins, charging him with the crime of grand larceny in the first degree. Immediately upon his arrest, writs of *habeas corpus* and *certiorari* were issued in his behalf, and the relator was brought before a Special Term of the Supreme Court. After a hearing, this tribunal dismissed the writ of *habeas corpus*, and remanded the relator into custody. Upon his appeal the Appellate Division, in the first Department, reversed the order of the Special Term, and discharged the relator. The People then appealed to the Court of Appeals, where, by a vote of four to three, the decision of the Appellate Division was affirmed.

It appears to have been the purpose of the District Attorney, by the rather unusual procedure employed in this case, to secure an authoritative judicial determination of the question, whether such a diversion of an insurance company's funds as has been described above amounts to larceny under the New York Penal Code. If it did not, then it would be a waste of public money and an unwarranted stirring up of scandal to secure indictments against sundry persons, and bring them to trial for conduct which was not criminally punishable. The single question, then, in this case was, did the affidavits, which were presented to the magistrate, and which set forth the facts narrated above, furnish any legal evidence of the commission of the crime of larceny by Mr. Perkins?[1]

That crime is defined in section 528 of the Penal Code, which reads, so far as material, as follows:

> "A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, * * * having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association or corporation, * * * any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof, steals such property, and is guilty of larceny."

The learned judge, who heard the case at Special Term, decided that the facts presented to Magistrate Moss made out a

[1] Gray, J., in 187 N. Y., at p. 418, 80 N. E., at p. 385, says: "If the information, which was laid before the magistrate furnished no legal evidence of the commission of a crime by the relator, then he was illegally restrained of his liberty."

prima facie case of larceny, as that crime is defined above. He held that Mr. Perkins "exercised a control of the funds alleged to have been misappropriated, within the contemplation of the statute," and that the appropriation of the funds, by the concerted action of him and Mr. McCall, to the use of the treasurer of a national campaign committee, under the circumstances disclosed in the affidavits presented to the magistrate, was larceny under the Code, if it was done with a criminal intent. Such intent, he thought, was disclosed by the fact, that the contribution in question was not only *ultra vires*, but inherently wrong. Said the learned judge:[1]

"To permit an artificial creature of the State, unless it be a corporation expressly authorized by law to engage in political matters, by the unauthorized use of its corporate funds, to become an active force in a political contest, would, in my opinion, be to sanction an infringement upon the rights of voters, who alone, either as individuals or through political organizations, may elect, directly or indirectly, officials in advocacy of the principles for which they contend. To encourage the unauthorized use of corporate funds for political purposes might result in the creatures of the State becoming its masters. Any unauthorized act of a corporation that affects public interests with such serious and far-reaching consequences is a menace to the State and against public policy."

Later, he adds:

"If I am correct in assuming that a corporate gift for political purposes is wrongful, and therefore illegal, then in a case where a trustee of a corporation like that of a life insurance company, who knowingly, consciously and deliberately appropriates the money of the corporation to the use of a political campaign committee, there would be present all the elements required to establish the commission of the crime of larceny, and reasonable grounds for believing that the person charged committed it, unless we may say as a matter of law that one charged with the commission of a crime may escape its consequences by admitting the facts that *prima facie* would establish it, and pleading ignorance of their legal effect and absence of intent to do any wrong."

These views were rejected unanimously by the Appellate Division. While the members of this tribunal filed separate opinions, which contain a considerable variety of reasoning, they agreed in the conclusion, that the information laid before the magistrate did not furnish reasonable ground to believe that the relator had committed the crime of larceny. None of them look upon the contribution to a party campaign fund, by the officers

[1] Greenbaum, J., 50 Misc. 198, 208, 209, 100 N. Y. Supp. 427.

of a life insurance company, of $48,500 of the company's money as illegal. It was at most an *ultra vires* act. It was neither *malum prohibitum* nor *malum in se.* As the relator declared that he believed this expenditure to be for the benefit of the company, and that he derived no personal advantage of any kind from the transaction, these judges were of the opinion that there was "nothing sufficient to justify the imputation of criminal intent or design on the part of the relator to steal moneys of the insurance company by appropriating them to his own use, or to the use of some one other than the corporation."[1]

It should also be noted that the members of this court assume that the alleged larceny of the relator consists in his receiving and applying to his own use the moneys paid over to him in December. His claim to such moneys, say these judges, was based upon the promise of President McCall, which had been approved by the finance committee. While such promise might be *ultra vires* and unenforceable at law, it was a sufficient basis for the relator's claim to the sum which was paid to him, and brought his case within § 548 of the New York Penal Code:[2]

"Upon an indictment for larceny it is a sufficient defense that the property was appropriated openly and avowedly, under a claim of title preferred in good faith, even though such claim is untenable."

This theory of the case was rejected by the Court of Appeals. The alleged crime of the relator was admitted by the majority as well as the minority judges, to consist in aiding and abetting President McCall in turning over $48,500 of the company's funds to the Republican National Campaign Committee.[3]

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[1] Opinion of Patterson, J., 113 App. Div., at p. 347.

[2] Opinion of Ingraham, J., Ibid., at p. 337; opinion of McLaughlin, J., Ibid., at p. 340; opinion of Laughlin, J., Ibid., at p. 349.

[3] "The act of the president of the insurance company, which the relator may be regarded as abetting (section 29, Pen. Code), that is the contribution of corporate funds for the purposes of a political campaign," Gray, J., 187 N. Y., at p. 420, 80 N. E., at p. 386; "and, while the contribution was suggested and made by the authority and direction of the president of the company rather than by the relator, still the latter was so a party to the execution of the act that he must be regarded as having aided and abetted it, and therefore is criminally responsible if a crime was committed," Hiscock, J., 187 N. Y., at p. 425, 80 N. E., at p. 388; "it is also unnecessary to consider whether the relator as an officer of the company had at the time in his 'possession, custody, or control' the funds or property of the company within the provisions of the Penal Code. Certainly the president had such custody and control, and by section 29 of the Penal Code a person who aids or abets the commission of a crime, or directly or indirectly counsels its commission, is equally a principal with the person who commits the acts. Nor have the pro-

The members of this court also agreed in holding, that it is not necessary to the crime of larceny that the property be appropriated *lucri causa.*[1]

They were unanimous, too, in holding that "the contribution by the President of the New York Life Insurance Company from its funds of $50,000 to a political campaign committee, even in the absence of any statutory prohibition, was absolutely beyond the purposes for which that corporation existed, and was wholly unjustifiable and illegal."[2]

While the judges were "all agreed," that the contribution in question "was wholly unjustifiable and illegal," they differed as to the inferences to be drawn from the relator's connection with the matter. The majority were of the opinion that the facts did not warrant the inference of the criminal intent necessary to larceny. Said Judge Gray, writing for the majority:

"In the facts stated in these depositions I find none upon which criminality can be predicated. The essential element of the 'intent to deprive and defraud'[3] is nowhere to be found, and there is no just basis for the inference. There was no concealment about the transaction, and knowledge of it was conveyed to the other trustees. That the relator may have made a mistake of law, which will not relieve him from liability in a civil action, may be true, and he expressly disclaimed in his letter any intention to dispute such a liability; but this was a case where the intent, or good faith, was in issue and then knowledge of the law is immaterial. * * * The facts showed that the design to injure, the motive to despoil the company, the wrongful purpose, were all lacking in the information, which was laid before the magistrate and upon which the warrant issued. This being so, the act of the magistrate was wholly without jurisdiction, and the warrant and all proceedings under it were absolutely void."

Judge Hiscock, who wrote a second majority opinion, expressed himself as follows:

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visions of section 548, that it is a sufficient defense to indictment for larceny that the property was appropriated openly under a claim of title in good faith, any application to the case. The crime, if there was any in this case, commenced when the original agreement was made between the relator and the president, by which the money of the company was to be appropriated to the use of Bliss, and the method was adopted, for the purpose of concealing such appropriation, that the relator should in the first instance pay the money to Bliss, and thereafter receive the money of the company. The repayment to the relator was not an independent transaction, but part of the original scheme, and must stand or fall with the legality or criminality of that scheme." Cullen, C. J., 187 N. Y., at p. 434, 80 N. E., at p. 391.

[1] Opinion of Gray, J., 187 N. Y., at p. 419; opinion of Cullen, C. J., Ibid., at p. 438, citing Reg. *v.* White (1840) 9 C. & P. 344.

[2] Opinion of Hiscock, J., 187 N. Y., at p. 425, 80 N. E., at p. 388.

[3] The language of the Code is "intent to deprive *or* defraud."

"There is wanting every one of those circumstances of personal gain, furtive secrecy in the commission of the act and of concealment after commission which, as essential elements, ordinarily attend the crime of larceny, and, if there is any evidence here of a criminal intent, it is found simply and solely in the fact that the officers of the corporation have contributed some of its funds to an unauthorized purpose. As already indicated, it does not seem to me that this fact is sufficient to sustain the burden thus cast upon the prosecution."

On the other hand, Chief Judge Cullen, writing for the minority, asserted that the magistrate, to whom the depositions were presented, might well infer a criminal intent on the part of Mr. Perkins and Mr. McCall. His view is thus stated:

"The relator and the president of the company, without the authority of the corporation and knowing that all the beneficial owners would never assent to the act, took the moneys of the company without consideration and appropriated them to the exclusive use of a third party. The relator must be presumed to have known the law and to have intended the natural consequences of his acts, which were to deprive the company of the money. If he knew the illegality of his act and his intention was solely to benefit either Mr. Bliss personally or the political organization which he represented, then he was guilty of larceny. If, however, as asserted in his statements to the district attorney, he believed that the expenditure would be for the benefit of the company and that the president had the power to make the same, then, however mistaken on the subject, he was not guilty. This was necessarily and properly a question of fact to be determined by the magistrate, not one of law. Though the prosecution put in evidence before the magistrate the written statement of the relator, the magistrate was at liberty to believe it or to reject it in whole or in part.[1] The indirect method in which the payment to Mr. Bliss was made and the fact concealed by having the money in the first instance advanced by the relator instead of by the company, and the method in which the relator was reimbursed by a check, not to him personally, but to the order of J. P. Morgan & Co., a banking firm with which the corporation may have large legitimate dealings, casts suspicion on the good faith of the relator, and might be considered by the magistrate as militating against him. The explanation of this course offered by the relator, that it was to relieve the president from solicitations from other political parties, might also be discredited. It is difficult to imagine how the representatives of other parties would have access to the company's books; nor would the scheme of payment enable the officers of the company when solicited to say that the company had made no contributions to other parties, because such an answer would be as essentially a falsehood as if the money had been paid by the company in the first instance. The concealment of the payment as described

[1] People *v.* Van Zile (1894) 143 N. Y. 368, 38 N. E. 380; Becker *v.* Koch (1887) 104 N. Y. 394, 10 N. E. 701, 58 Am. Rep. 515; President, etc., Manhattan Co. *v.* Phillips (1888) 109 N. Y. 383, 17 N. E. 129.

would warrant the magistrate in finding that the parties were conscious of wrongdoing in making it and feared exposure. The relator asserts that he was ignorant of the character of the entries made in the company's books, and there is no proof to the contrary of this statement. But he must have known that the check to pay him was drawn, not to himself, but to Morgan & Co. On the other hand, there is, doubtless, to be considered in the relator's favor the fact that he made no pecuniary profit by the transaction, and that he afterwards openly admitted his participation in it. All this, however, merely raised a question of fact, to be passed on by the magistrate, with whose determination other courts cannot interfere in this proceeding."

It is apparent from the foregoing extracts that the judges differed in their conception of what constitutes criminal intent in larceny, under the Penal Code of New York. This difference is made still more apparent by the following quotations. Judge Hiscock writes:

"It may be difficult at all times exactly and satisfactorily to define this intent, but the requirement for it as applicable to this case means that, when the relator took part in the appropriation of the moneys in question, he must have had in some degree that same conscious, unlawful, and wicked purpose to disregard and violate the property rights of another which the ordinary burglar has when he breaks into a house at night with the preconceived design of stealing the property of its inmates."

Chief Judge Cullen declares:

"The meritorious character of the object to which the money was appropriated has no bearing on the question of larceny. The gist of that offense is not the application of money to a bad purpose, but taking money that does not belong to the taker to appropriate to an object good or bad."

In other words, according to the majority view, the prosecution does not make out a case of larceny (even under the Code provision quoted in the early part of this article), unless it shows that the prisoner had in some degree the conscious, unlawful and wicked purpose to disregard and violate property rights of another which characterize the ordinary burglar. According to the minority, while "no one can become a thief or an embezzler by accident or mistake," the prosecution makes out a *prima facie* case of larceny by showing that a defendant who, having in his possession, custody or control as an officer of a corporation property of such corporation, appropriates the same to his own use, or that of any other person than the corporation, with the intent to deprive the corporation of the property.

It is submitted that the minority view is preferable to that of the majority. The provisions of the Code do not bear out the statement, that one is not guilty of larceny who has not the conscious, unlawful and wicked purpose of the ordinary burglar. If we compare the definition of larceny in the present Code with that which was formerly contained in the New York Revised Statutes, it becomes apparent that the legislature did not anticipate any such gloss being put upon its later language. Under the earlier statute, larceny consisted in "the felonious taking and carrying away of the person or property of another."[1] But the Code omits the word "felonious," and without any adjective or qualifying phrase declares that larceny consists in the taking or appropriation of another's property, "with the intent to deprive" him of it, or of its use or benefit. Again, the Penal Code provides:

§ 549. "The fact that the defendant intended to restore the property stolen or embezzled is no ground of defense, or of mitigation of punishment, if it has not been restored before complaint to a magistrate charging the commission of the crime."

Surely, one who takes or appropriates the property of another, in violation of § 528, and thereby steals it, but who intends to restore it to the owner, has not the conscious, unlawful and wicked purpose of the ordinary burglar; but the absence of such purpose does not make his crime anything other than larceny.

Counsel for the prosecution asked the court to adopt the following doctrine as governing this case and others like it:

"A corporate officer paying out funds of the corporation without consideration moving to it, and without authority of its members or directors, for a purpose foreign to its business (if not also against public policy) and known or feared by him to be wrong, although payments for that specific purpose have not been specifically covered by any provision of the Penal Code, nevertheless commits the crime of larceny."

Is it not clear that the adoption of such a doctrine by a unanimous court would have produced a better effect than the decision which was rendered in this case? Would it not have exercised a wholesome influence in restraining directors, who belong to the modern school of high finance, and in protecting stockholders and the public, without harming any honest and faithful officer or director? Such a doctrine, it is submitted, would better accord with the language and purpose of the New York Penal Code, than that announced by the majority of the judges.

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[1] N. Y. Rev. St. Vol. 2, p. 679, §63.